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IN THE

Supreme Court of the United States

October Term, [redacted] 1969

No. [redacted]
34

MICHELE MARCHESE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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TOPICAL INDEX

	Page
Statement and History of Case	2
Jurisdiction	5
Statutes Involved	5
Statement of Facts	7
Questions Presented By This Petition	8
Reasons for Granting the Writ	9
Argument	11
I The use by government agents of the electronic transmitter concealed on the person of Sussman, their "special employee," whereby they were enabled to overhear conversations taking place in Marchese's apartment, by means of a receiving device some distance from the apartment, and their testimony, admitted over defense objection, constituted a violation of Marchese's rights of privacy and constitutional rights under the Fourth and Fifth Amendments of the United States Constitution	11
II Petitioner has the right in the present proceeding to raise the very substantial constitutional question of the use of the electronic transmitting device, even though he raised it in previous proceedings	16

TOPICAL INDEX

Argument (cont'd) Page

III

The United States district judge had the power and jurisdiction to grant the relief ordered by him, under the provisions of Sections 2243 (habeas corpus) and 2255 (motion procedure) of Title 28, U.S.C., to discharge petitioner for time served, in the interest of justice; and the circuit court had no power and jurisdiction to set aside, vacate and reverse the order of discharge .. 20

Conclusion 23

Appendix "A"

Opinion of the United States Court of Appeals for the Ninth Circuit

TABLE OF AUTHORITIES CITED

Cases

Baltimore v. Maryland, 338 U.S. 912 18

Beitel v. United States, 306 F.2d 665 22

Desist v. United States, 394 U.S. 244 ..... 14, 18

Estes v. Texas, 381 U.S. 532 15

Fraternal Order of Eagles v. United States, 57 F.2d 93 15

Goldman v. United States, 316 U.S. 129 ..... 13, 17

Gouled v. United States, 225 U.S. 298 ..... 15, 17

TABLE OF AUTHORITIES CITED

Cases (cont'd)	Page
Hadju v. State of Florida, 189 So.2d 230	13, 15
Hall v. United States, 286 F.2d 676	22
Jones v. Cunningham, 371 U.S. 236	5
Katz v. United States, 389 U.S. 347 ....9, 10, 13, 14, 17, 18	
Kolod v. United States, 390 U.S. 136	13
Lopez v. United States, 373 U.S. 427 ....10, 12, 13, 16, 17	
Marchese v. United States	
264 F.2d 892, cert. denied 360 U.S. 930	2
304 F.2d 154 (1962), cert. granted 374 U.S. 101 (1963).....2, 11, 12, 22	
341 F.2d 782, cert. denied 832 U.S. 816 (1965)	3
378 F.2d 16, cert. denied 389 U.S. 930, rehearing denied 389 U.S. 1025(1967)	3, 4, 16
390 U.S. 1001	4
McKenna v. Ellis, 280 F.2d 592	21, 22
On Lee v. United States, 193 F.2d 306	13, 14
343 U.S. 747.....11, 12, 13	
Osborn v. United States, 385 U.S. 323 .....10, 16, 17, 19	
People v. Reeves, 61 Cal.2d 268	15
People v. Roberts, 47 Cal. 2d 374	15
Powell v. Winan, 287 F.2d 275	21
Sanders v. United States, 373 U.S. 1 .....18, 19, 22	

TABLE OF AUTHORITIES CITED

Cases (cont'd) **Page**

Silverman v. United States, 365 U.S. 505 .....13, 14, 17

Stone v. United States, 232 Fed.Supp. 396 13

Todisco v. United States, 298 F.2d 208 16

White v. United States, 405 F.2d 838 .....10, 13, 16

Statutes

United States Constitution
Fourth Amendment .....
..... 2, 3, 4, 5, 8, 9, 11, 13, 14, 17, 18, 19
Fifth Amendment.....2, 3, 4, 5, 8, 9, 11, 13

18 U.S.C. 371 2
18 U.S.C. 4161, 4162, 4163 5

21 U.S.C. 174 ..... 2, 5

26 U.S.C. 7237(c) 2, 5

28 U.S.C. 1254(1) 5
28 U.S.C. 2241(a) 5
28 U.S.C. 2243 ..... 3, 5, 6, 8, 19, 20, 21, 22
28 U.S.C. 2255 .....2, 3, 4, 5, 6, 8, 11, 20, 21, 22

Rule

Rule 35, Rules of Criminal Procedure 22

IN THE

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Honorable Chief Justice and Associate Justices of the United States Supreme Court:

STATEMENT AND HISTORY OF CASE

Michele Marchese, along with his co-defendant Jesse Del Bono, was convicted of violation of narcotics laws of the United States (18 U.S.C. Sec. 371, 21 U.S.C. Sec. 174, and 26 U.S.C. Sec. 7237(c)) and sentenced on July 16, 1958 to ten years on each count, the counts to run concurrently. The judgments of conviction were affirmed on April 15, 1959 *without opinion*(264 F.2d 892, 9th Cir.). Certiorari was denied by the United States Supreme Court without opinion (360 U.S. 930, 938).

Motion under Title 28 U.S.C. Sec. 2255 filed by petitioner was denied on December 22, 1960, by Judge Thurmond Clarke, who tried the case, and inadvertently the time for appeal was permitted to lapse.

On June 20, 1961, Marchese filed a petition for writ of habeas corpus. In the absence of Judge Clarke, on June 29, 1961, Judge Pierson M. Hall denied and dismissed the petition *ex parte* without a hearing, and Marchese appealed. The circuit court affirmed the judgment on May 31, 1962 (304 F.2d 154). In its opinion, the court avoided a direct ruling both on the issue of the violation of petitioner's constitutional rights of privacy under the Fourth and Fifth Amendments to the United States Constitution and on the issue that Malcolm Richards, the federal narcotics agent in charge of the investigation, had committed perjury at the trial.

On June 10, 1963, the Supreme Court granted Marchese's petition for writ of certiorari (374 U.S. 101), rendering its decision as follows:

"*Per Curiam.*

"The petition for writ of certiorari is granted,

> the judgment vacated and the case remanded to the United States District Court for the Southern District of California for reconsideration in the light of *Sanders v. United States*, 373 U.S. 1."

After several sessions of hearing in the district court, Judge Clarke, on September 30, 1963, granted the petition, reduced petitioner's sentence to five years and discharged him for time served, since petitioner had already served 4 years and 4 months of his sentence—with an excellent prison record.

On February 10, 1965, the Ninth Circuit Court of Appeals reversed the judgment of Judge Clarke (341 F.2d 782). The court completely, again, avoided a direct ruling on the issues of the violation of petitioner's constitutional rights of privacy under the Fourth Amendment and also under the Fifth Amendment. Certiorari was denied by the Supreme Court on March 3, 1965 (382 U.S. 817).

After remand, petitioner made a motion to file amended findings of fact, conclusions of law and judgment to conform to the opinion of the circuit court; but due to the apparent ambiguity of the said opinion of the circuit court, Judge Clarke denied said motion without prejudice and certified the matter to the circuit court for clarification. He also reserved ruling, pending such clarification, on the motion to treat said motion as a new motion under Title 28 U.S.C. Sections 2243 and 2255. Marchese appealed, believing that the original order of discharge was still valid and effective, requiring only an amendment thereto in order to meet the technical objections raised by the circuit court. On May 25, 1967, the circuit court again held that Judge Clarke had no authority to discharge the petitioner (378 F.2d 16). On November 6, 1967, certiorari was denied (389 U.S. 930); and on December

18, 1967, a petition for rehearing was denied (389 U.S. 1025).

Following the denial of certiorari, petitioner, pursuant to the request and notification of the United States Attorney, voluntarily surrendered to the United States Marshal, in Los Angeles, and was for a time confined at the United States Correctional Institution at Terminal Island, California. While there, he filed, on December 4, 1967, a motion under Title 28 U.S.C. Sec. 2255 in the United States District Court, Central District of California, No. 67-1744-T.C., to vacate and set aside the judgment of conviction and to discharge him from custody, on the grounds: (1) that his constitutional rights under the Fourth and Fifth Amendments had been violated by the use of a hidden electronic transmitting device, and (2) that the judgment of discharge by Judge Clarke on September 30, 1963, was valid and controlling and that the Ninth Circuit Court of Appeals was without jurisdiction to reverse and set aside said discharge.

On December 5, 1967, Judge Clarke—without a hearing, by reason of the prior circuit court decision—denied the motion without prejudice to the right of petitioner to file application for writ of habeas corpus. On April 23, 1969, the circuit court affirmed said order. A copy of the opinion is annexed as Appendix "A," since the opinion is not yet published in the Federal Reporter. A petition for rehearing, with suggestion of hearing *en banc,* was timely filed; but the petition was denied on June 12, 1969.

On or about January 11, 1968, Marchese filed a petition for writ of habeas corpus to Mr. Justice Douglas, who referred the petition to the Court. It was docketed on January 15, 1968 as Misc. No. 1178, October Term 1967. On April 1, 1968, the Court declined to review the matter (390 U.S. 1001).

Due to his excellent prison record, Marchese earned 1,257 days of good time and industrial time and was mandatorily released after about 6 years and 8 months in prison, under the provisions of Title 18 U.S.C. Sections 4161, 4162 and 4163. However, the issues herein are not moot, and Marchese still has the right to pursue his remedies under the motion procedure or habeas corpus, as the United States Board of Parole asserts that he is still under parole for the remainder of his ten-year sentence (amounting to more than 3 years), despite the fact that he was convicted under Title 21 U.S.C. Section 174 and Title 26 U.S.C. Section 7237(c), which prohibited suspension of sentence, probation or parole. In view of such claim of the Parole Board, unless it is otherwise determined, petitioner is deemed still to be "in custody" (*Jones v. Cunningham,* 371 U.S. 236), with his liberty restricted.

JURISDICTION

Jurisdiction is conferred on this Court by Title 28 U.S.C. Section 1254(1) to review the judgment in question.

STATUTES INVOLVED

Fourth and Fifth Amendments to the United States Constitution.

Title 18 U.S.C. Sections 4161, 4162 and 4163.

Title 21 U.S.C. Section 174.

Title 26 U.S.C. Section 7237(c).

Title 28 U.S.C. Sections 2241(a), 2243 and 2255.

Title 28 U.S.C. Section 2255 provides in part as follows:

"Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States Attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set aside the judgment and shall discharge the prisoner or re-sentence him or grant a new trial or correct the sentence as may appear appropriate.

"A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

"The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

"An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality

of his detention."

Title 28 U.S.C. Section 2243 provides in part with respect to the application for a writ of habeas corpus as follows:

> "The court shall summarily hear and determine the facts and dispose of the matter as law and justice require."

STATEMENT OF FACTS

One Donald Sussman, a narcotics addict, was a long time friend of Marchese, and Marchese had spent considerable money to have Sussman cured of his addiction, without success. On May 25, 1956, Sussman had been convicted of violating California's narcotics laws and was placed on probation for five years. On January 29, 1958, he was arrested by agent Malcolm Richards of the Federal Narcotics Bureau and taken to a conference with Howard Chappel, head of the Bureau, and other agents, in the Federal Building in Los Angeles, California. As a result of an arrangement made with Sussman, he was released "O.R." and called upon Marchese in the latter's apartment the next day, January 30th. Sussman was equipped by the agents with a Schmidt transmitter, an electronic transmitting device, concealed on his person. The conversation between Sussman and Marchese, unbeknownst to the latter, was transmitted and listened to by Richards and Los Angeles County Deputy Sheriff Farrington, at some distance from the apartment, by means of a receiving device. This procedure was repeated on January 31st and February 7th. At the trial, Sussman testified that he was informed that the conversations were recorded and each time he signed the transcription of the record. Following a

recess, when Sussman resumed the stand, the United States Attorney elicited from him testimony that there was no actual recording. When a demand was made by defendant's counsel for the recording, the government witness stated that there was no recording. Richards and Farrington were permitted, over defendant's objection, to testify as to what they overheard, even though they admitted that they could hear only parts of the conversations. Their testimony was somewhat in conflict with that of Sussman and of each other. However, their testimony was very prejudicial to defendant.

QUESTIONS PRESENTED BY THIS PETITION

1. Whether the use by government agents of the electronic transmitter concealed on the person of Sussman, their "special employee," whereby they were enabled to overhear conversations taking place in Marchese's apartment, by means of a receiving device some distance from the apartment, and their testimony thereof, admitted over defense objection, constituted a violation of petitioner's rights of privacy and constitutional rights under the Fourth and Fifth Amendments to the United States Constitution?

2. Whether petitioner has the right in the present proceeding to raise the very substantial constitutional question of the use of the electronic transmitting device, even though he raised it in previous proceedings?

3. Whether the United States District Court judge has the power and jurisdiction to grant the relief ordered by him, under Title 28 U.S.C. Sections 2243 (habeas corpus) and 2255 (motion procedure), to discharge petitioner for time served, in the interest of justice; and whether the circuit court had the

power and jurisdiction to set aside, vacate and reverse the order of discharge?

REASONS FOR GRANTING THE WRIT

1. This case involves important questions of constitutional rights under the Fourth and Fifth Amendments; namely, whether there was a violation of constitutional rights by reason of the use by government agents of a transmitting device concealed on their agent, employee or stool pigeon, or so-called "special employee," to be carried into a person's home, office or other private place, whereby the agents may overhear, by means of a listening device, conversations taking place within the privacy of such home, office or other private place, and thereafter be permitted to testify as to what was allegedly overheard. This constitutional question should be settled by this Court.

2. This Court should settle and determine the question as to whether the acts of the agents in placing and concealing a transmitting device on Sussman, who carried it into Marchese's apartment, gaining access thereto by fraud, trickery and deceit, and in the guise of a social or business acquaintance, was in fact an intrusion and trespass and a violation of Marchese's rights of privacy. If so, then the Fourth Amendment's protection should be extended to Marchese under a long line of decisions by this Court based on physical intrusion, penetration and trespass.

3. This Court should determine whether the non-retroactivity of the new views announced by it in *Katz v. United States*, 389 U.S. 347, applies to this and cases with similar situations involving the use of concealed transmitting devices, or whether, due to the physical intrusion, the non-retroactiv , rule

is inapplicable.

4. In the recent case of *White v. United States*, 405 F.2d 838, the Court of Appeals for the Seventh Circuit held that the use of the hidden transmitter on the informer under circumstances similar to Marchese's case was in violation of the defendant's constitutional rights. The court relied partly on *Katz* and partly on the implications of *Lopez v. United States*, 373 U.S. 427. The *White* decision is in direct conflict with the decision of the Ninth Circuit Court of Appeals in the instant matter. This conflict should be settled.

5. On or about April 19, 1969, this Court granted certiorari in *White*, in Case No. 1024 October Term 1968, but has not rendered its decision thereon. The instant case should be considered along with and as a companion case with *White*, and the Court should settle the issues of both cases at the same time.

6. This Court should consider that Marchese raised the issue of the violation of his constitutional rights, by the use of the hidden transmitter, in the various proceedings set forth above; that the Ninth Circuit Court of Appeals bypassed the issue and avoided a direct ruling thereon; and that Marchese has never had a determination thereof, except possibly in the 1967 decision of said court wherein it erroneously upheld the use of the device because of the "consent" not of Marchese but of the government's "special employee" and because the court relied on the wholly inapposite case of *Osborn v. United States*, 385 U.S. 323.

ARGUMENT

I

The Use By Government Agents Of The Electronic Transmitter Concealed On The Person Of Sussman, Their "Special Employee," Whereby They Were Enabled To Overhear Conversations Taking Place In Marchese's Apartment, By Means Of A Receiving Device Some Distance From The Apartment, And Their Testimony, Admitted Over Defense Objection, Constituted A Violation Of Marchese's Rights Of Privacy And Constitutional Rights Under The Fourth And Fifth Amendments Of The United States Constitution.

In the case of *On Lee v. United States,* 343 U.S. 747 (the earliest decision of this Court on the above issue), an electronic transmitting device was concealed by government agents on the person of Chin Poy, and this Court held that On Lee's constitutional rights were not violated. In that case, however, the transmission took place on the streets in New York and in that portion of On Lee's laundry to which the public was invited. In his brief, the Solicitor General made a distinction between the use of such device in a public place and its use in a home, contending that in a public place such a device would be permissible where it might not be so permitted in a home. In the instant case, the distinction clearly exists, as the transmission took place in Marchese's apartment.

About two weeks before this Court reversed the judgment of the district court and the circuit court denying Marchese's 28 U.S.C. 2255 motion and remanded the case to the district

court for reconsideration (304 F.2d 154, cert. granted 374 U.S. 101), which it did and discharged Marchese, the Court decided the case of *Lopez v. United States, supra.* In *Lopez,* the Court held that a recording device could be used to corroborate the agent's testimony, as being, in effect, the best evidence. The concurring opinion of Mr. Justice Warren stated that the *On Lee* case was wrongly decided and should not be revitalized. Mr. Justice Harlan, in his dissenting opinion–in which he was joined by Mr. Justice Douglas and Mr. Justice Goldberg, referring to *On Lee,* stated:

> "I believe that that decision was error in reason and authority, at the time it was decided; that subsequent experience has sapped whatever vitality it may once have had; that it should now be regarded as overruled; that the instant case is rationally indistinguishable; and that, therefore, we should reverse the judgment below.
>
> "The United States, in its brief and oral argument before this Court in the instant case, made little effort to justify the result in *On Lee,* doubtless because it realizes that that decision has lost virtually all of its force as authority. Instead, the government seeks to distinguish the instant case. This strategy has succeeded, it appears, with a majority of my Brethren. The Court's refusal to accord more than a passing mention in its opinion to the only decision of this Court–*On Lee*– factually analogous to the case at bar suggests very strongly that some of my colleagues who have joined the Court's opinion today agree with us that *On Lee* should be considered a dead letter."

As indicated by the Court in Note 4, quoting from Judge Frank's dissenting opinion in *On Lee* in the circuit court, and the concurring and dissenting opinions above, the majority of this Court in *Lopez* distinguished between the use of a recorder for corroborative purposes and the use of a transmitting device, the latter impliedly being a violation of constitutional rights under the Fourth and Fifth Amendments.

In *Lopez*, the petitioner knew that he was dealing with a government agent and that what he said might be used against him by the government. In Marchese's case, Sussman gained access to Marchese's apartment not as a known government agent but fraudulently in the guise of a friend and social acquaintance.

Other cases followed the dicta and implications of *Lopez* in excluding evidence obtained by means of an electronic transmitting device, to wit:

Kolod v. United States, 390 U.S. 136;
Stone v. United States, 232 Fed.Supp. 396;
Hadju v. State of Florida, 189 So.2d 230;
White v. United States, supra.

Prior to *Lopez*, this court decided *Silverman v. United States*, 365 U.S. 505. In that case a "spike mike" was driven into the outer wall of Silverman's apartment, penetrating into the wall several inches until it touched a heating duct. With the use of an electronic device, agents overheard conversations taking place within the apartment. This was held to violate Silverman's constitutional rights, since there had been a physical trespass, and distinguished the case from *Goldman v. United States*, 316 U.S. 129, where a "detectaphone" was placed against the outside wall of Goldman's apartment.

In *Katz v. United States, supra*, this Court, for the first

time, announced the rule that the physical intrusion or trespass is not necessary, since the Fourth Amendment protects persons as well as places, thus overruling the previous decisions making intrusion necessary for the invoking of the Fourth Amendment.

Then, in *Desist v. United States,* 394 U.S. 244, the Court held that *Katz* was not retroactive to the extent that it departed from previous holdings of this Court, and it was upon this theory of non-retroactivity that the circuit court again in Marchese bypassed the issue of the use of the transmitting device.

We contend that the circuit court misinterpreted the facts and the law applicable to Marchese, and that there was a physical intrusion when the hidden transmitting device was carried into Marchese's apartment unbeknownst to him. Judge Jerome Frank, in his dissenting opinion in *On Lee* (193 F.2d 306), considered this a trespass, when he stated:

> "The invading microphone enabled a third person, about whom On Lee knew nothing, to be present at the conversation. It accomplished the same purpose as if . . . the agent had smuggled himself into the room to listen behind closed doors, or as if the agent had been a midget and had been hidden in a bag carried by Chin Poy onto On Lee's premises."

There is no difference between having the transmitting device surreptitiously carried into the apartment and the driving of a "spike mike" several inches into a wall of an apartment as was done in *Silverman.* In both cases there was a physical intrusion of the device by which those outside were enabled to overhear the conversations occurring within the apartment.

Furthermore, since Sussman gained access to Marchese's apartment by means of fraud, trickery, deceit, subterfuge and in the guise of a social or business acquaintance, his entry thereupon, in effect, became a trespass, making his entry illegal.

Gouled v. United States, 225 U.S. 298;
Fraternal Order of Eagles v. United States, 57 F.2d 93;
People v. Reeves, 61 Cal.2d 268;
People v. Roberts, 47 Cal.2d 374;
Hadju v. State of Florida, supra.

The court in *Hadju* expresses the above rule clearly on page 232, where it states:

> "The use of such surreptitiously obtained information violates the right of privacy preserved by the Fourth Amendment of the United States Constitution, which is applicable to state proceedings. [Citing cases.]
>
> "The entry into private premises by an agent of the government by stealth, fraud and deceit has often been condemned. Perhaps the best discussion of the law is cited in *Gouled v. United States,* 225 U.S. 298 . . . "

In the case of *Estes v. Texas,* 381 U.S. 532, the Supreme Court reversed the conviction of petitioner. Mr. Justice Warren, in his concurring opinion, stated at page 585:

> "But the television camera, *like other technical innovations,* is not entitled to invade the lives of everyone in disregard of constitutionally protected rights." (Emphasis added.)

Note 44 on page 585, in connection with the above statement,

reads as follows:

> "Compare *Olmstead v. United States,* 277 U.S. 438, 471 (dissenting opinion of Mr. Justice Brandeis); *On Lee v. United States,* 343 U.S. 747, 762 (dissenting opinion of Mr. Justice Douglas); *Silverman v. United States,* 365 U.S. 505; *Lopez v. United States,* 373 U.S. 427, 445-446 (opinion concurring in the result), 465 (dissenting opinion of Mr. Justice Brennan)."

The Ninth Circuit Court of Appeals has, on each occasion in Marchese's case, ignored *Lopez* and the implications thereof. While it has avoided a direct ruling on the issue in the instant case, in other cases it has held that the use of a concealed electronic transmitting device does not violate constitutional rights (*Todisco v. United States,* 298 F.2d 208). This view is in conflict with the cases above cited, especially *White v. United States, supra,* and the conflict should be resolved by this Court and the issue definitely settled.

II

Petitioner Has The Right In The Present Proceeding To Raise The Very Substantial Constitutional Question Of The Use Of The Electronic Transmitting Device, Even Though He Raised It In Previous Proceedings.

As we have pointed out, *supra,* despite the raising by petitioner of the aforesaid constitutional question, the Ninth Circuit Court of Appeals avoided a direct ruling thereon until its decision in 378 F.2d 16, in the previous appeal. However, in that decision it held that it relied on *Osborn v.*

United States, supra, in upholding the use of the hidden transmitter. However, that case was entirely inapposite.

In *Osborn,* a recording device was hidden on the person of a police officer, for the recording of a conversation between himself and petitioner, only after a court order was obtained based upon a detailed factual affidavit which would have been sufficient to support a search warrant. In other words, it was a clear example of "the procedure of antecedent justification before a magistrate that is central to the Fourth Amendment as a pre-condition of lawful electronic surveillance." In *Marchese,* no such prior order was obtained, and the circuit court's reliance on *Osborn* was wholly misplaced.

In its last opinion (Appendix A), the circuit court again, in effect, bypassed the issue presented, by stating that *Katz* was not retroactive and, therefore, not applicable. As we have pointed out above, the new non-retroactive doctrine of *Katz* that *persons* are protected was and is not necessary to the decision of the instant case, as there was herein a physical intrusion gained by subterfuge, fraud, deceit, trickery and in the guise of social acquaintance–a practice long condemned by this Court and other courts. Thus, the previous decisions of this Court, especially *Gouled, Lopez* and *Silverman,* and even *Goldman* (which decision was based upon the fact that the use of the "detectaphone" involved no trespass or intrusion), established the violation of Marchese's constitutional rights under the Fourth Amendment without reference to or reliance upon the non-retroactive part of the *Katz* decision.

Although this Court has on three occasions denied certiorari in Marchese's petitions, such denial does not carry

with it any implication whatever of this Court's views on the merits of a case it has declined to review (*Baltimore v. Maryland,* 338 U.S. 912, 919).

On the other hand, when this Court granted certiorari and reversed and remanded Marchese's case for reconsideration in the light of *Sanders v. United States,* 373 U.S. 1, such action imported a disagreement with the views of the lower courts.

The Court, in *Desist,* held non-retroactive, as we have pointed out, only that portion of *Katz* which did away with the requirement of trespass or actual penetration of an enclosure for the invoking of the protection of the Fourth Amendment. Thus, the issue in this case is left open as to whether the carrying into Marchese's apartment by a "special employee' of the government the concealed transmitting device constituted an intrusion or trespass, thereby constituting a violation of the Fourth Amendment. We submit that this issue should now be definitely settled by the Court.

In *Sanders*, the Court stated, at page 15:

> "Controlling weight may be given to denial of a prior application for habeas corpus or Sec. 2255 relief only if (1) the same ground presented in the subsequent application was determined adversely to the applicant on the prior application, (2) the prior determination was on the merits, (3) the end of justice would not be served by reaching the merits of the subsequent application."

With respect to No. 1, we contend that the only time the ground relied on by petitioner was determined adversely to him was in the last or fourth appeal when the Ninth Circuit Court of Appeals

erroneously relied on the inapposite *Osborn* case, *supra*. In all previous appeals it avoided a direct ruling and hence did not determine the issue adversely to petitioner.

With respect to No. 2, the only prior determination of the matter on the merits was when Judge Clarke, after the remand of the case by this Court after reversal of the judgment, found that the constitutional rights of petitioner under the Fourth Amendment had been violated by the use of the hidden transmitter and discharged petitioner in the ends of justice for time served, amounting to about 4-½ years in prison. The circuit court, not passing directly on the issue, reversed the order of discharge on the ground that Judge Clarke exceeded his jurisdiction. Thus, there was no actual determination by the circuit court on the merits.

With respect to No. 3, Judge Clarke found that it would be equitable and just and in the ends of justice to discharge petitioner and did so in order to dispose of the matter as law and justice require. (Title 28 U.S.C. Section 2243) Since under *Sanders* the motion procedure is the substantial equivalent of federal habeas corpus, Judge Clarke had jurisdiction and the power to do so, and the circuit court erroneously denied him this power.

We feel that this Court should settle this question; namely, whether the relief to be given is the same under habeas corpus and the motion procedure.

III

The United States District Judge Had The Power And Jurisdiction To Grant The Relief Ordered By Him, Under The Provisions Of Sections 2243 (Habeas Corpus) and 2255 (Motion Procedure) Of Title 28, U.S.C., To Discharge Petitioner For Time Served, In The Interest Of Justice; And The Circuit Court Had No Power And Jurisdiction To Set Aside, Vacate And Reverse The Order Of Discharge.

Following the reversal by this Court on June 10, 1963, of the order denying Marchese's petition for habeas corpus, Judge Clarke had a hearing on the petition. At the conclusion he stated that he was granting the petition and ordering Marchese's discharge. Out of an abundance of caution, counsel for Marchese requested that the order also contain a provision for reduction of sentence.[1]

---

[1]At the hearing a discussion took place between Judge Clarke and counsel for Marchese and the Assistant United States Attorney as follows:

"THE COURT: Well. Mr. Parsons, I want to ask you a question. I am going to rule with you and I can rule, my thought is, on 2255. He has already been incarcerated four and a half years . . . " (R.T. p.74)

"MR. PARSONS: I think you can modify. I must respectfully disagree with counsel for the Government. 2255 gives you full power. It says so in it. It followed the old English common law version of coram nobis and they merely put it in the statute–where there is a wrong, there is a remedy." (R.T. p. 74)

"THE COURT: Well, what I will do, I will dismiss the matter, using section 2255. I will order the defendant discharged at this time, his having served four years and how many months." (R.T. p. 76)

"MR. SCHULMAN: [Assistant U. S. Attorney] I do not understand the judgment, your Honor. . . .

"THE COURT: Well, I am dismissing it under 2255.

"MR. SCHULMAN: And you are granting the motion?

"THE COURT: That is right, and I am discharging the defendant now on the theory that he has already served four years, and how many months, so many months." (R.T. p. 77)

"THE COURT: I am doing it under 2255. Then in addition to that I am ordering him discharged, which Mr. Parsons requests, on the theory that he has already served." (R.T. p. 78)

"THE COURT: I said I am granting relief under section 2255. I am setting aside the sentence . . . I am going to vacate the sentence,

The circuit court held that Judge Clarke exceeded his jurisdiction, completely ignoring the fact that petitioner was proceeding under both habeas corpus and motion procedure, since he was imprisoned in the district in which he was tried. Under Section 2243 (habeas corpus) it is provided that the court entertaining the application for habeas corpus "shall summarily hear the matter and determine the facts and dispose of the matter as law and justice require." Judge Clarke found that petitioner's constitutional rights had been violated by the use admitted by the government of the hidden transmitting device, and by written conclusions of law concluded that it would be fair, equitable and just to discharge petitioner, and he made his order thereon.

Judge Clarke's order to discharge the petitioner for time served (Marchese had already served 4 years in prison) followed the rule announced in several decisions, among which are: *Powell v. Winan,* 287 F.2d 275, and *McKenna v. Ellis,* 280 F.2d 592. In both cases constitutional rights of petitioners were violated and, since both had served half of ten and eight-year terms, the courts discharged them for time served. In *McKenna,* the court stated, at page 604:

> "The court's duty upon a habeas corpus proceeding is to 'dispose of the matter as law and justice require' . . . It is our opinion that McKenna's discharge will best serve the ends of justice. [Citing authorities.] The judgment is therefore

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1 (cont'd)
but I am going to make it contingent on that and modify the sentence from 10 to 5 years. That is what Mr. Parsons advocates. He could be right and I could be wrong in the matter."

"THE COURT: Well, I am ordering both ways. I am ordering 2255 and then as another condition I am modifying the sentences from ten years to five years."

> reversed and the cause remanded with directions to discharge the prisoner."

Since the motion procedure is the equivalent of habeas corpus (*Sanders v. United States, supra*), the district court could discharge Marchese for time served on the motion or, if that be inadequate, fall back on habeas corpus in Marchese's case.

We submit that Judge Clarke's order should still be upheld as valid and in effect, despite the decision of the Ninth Circuit Court of Appeals to the contrary. The discretion to discharge Marchese was not only conferred upon Judge Clarke by Sections 2243 and 2255 but also by the order of this Court granting certiorari and remanding the case to him for consideration (374 U.S. 101).

Since Judge Clarke was the sentencing judge, his discretion in the matter was similar or analogous to the discretion conferred on the judge in Rule 35 of Title 18, U.S.C., Rules of Criminal Procedure, to reduce a sentence. It has been held that his discretion is sole and absolute and not subject to the jurisdiction or review of the circuit court (*Beitel v. United States*, 306 F.2d 665, 672; *Hall v. United States*, 286 F.2d 676).

We submit that the circuit court exceeded its jurisdiction in depriving the district court judge of his sole discretion and that this Court, in the exercise of its power of supervision, should so rule and reinstate Judge Clarke's order of discharge, especially now that petitioner has received his mandatory release under the ten-year sentence. Such discharge would preclude the Parole Board from attempting to treat him as on parole for about 3-½ more years.

CONCLUSION

For the foregoing reasons, we respectfully submit that this petition for certiorari should be granted and that petitioner be discharged fully and completely.

Respectfully submitted

BURTON MARKS and
RUSSELL E. PARSONS

Attorneys for Petitioner

APPENDIX "A"

Opinion of the United States Court of Appeals For the Ninth Circuit

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Michele Marchese, Appellant, vs. United States of America, et al., Appellees.

No. 22,681.

[April 23, 1969]

Appeal from the United States District Court for the Central District of California.

Before: BARNES, DUNIWAY and ELY, Circuit Judges.

BARNES, Circuit Judge:

Appellant was convicted on June 16, 1958 of selling two pounds of heroin—approximately equaling in size a loaf of bread. He was sentenced to ten years imprisonment.

To understand this appeal requires familiarity with the following opinions of this court and orders of the United States Supreme Court: *Marchese v. United States*, 264 F.2d 892, *cert. denied*, 360 U.S. 930 (1959); *Marchese v. United States*, 304 F.2d 154 (1962), *cert. granted and vacated*, 374 U.S. 101 (1963); *Marchese v. United States*, 341 F.2d 782, *cert. denied*, 832 U.S. 817 (1965); *Marchese v. United States*, 378 F.2d 16, *cert. denied*, 389 U.S. 930, *rehearing denied*, 389 U.S. 1025 (1967).

In 1965, when appellant's case was in this court for the second time, we referred to appellant's legal maneuvers as "extraordinary." We referred again to the extraordinary

nature of the proceedings after appeal in 1967. Nothing has caused us to change our expressed opinion.

During the almost nine years between June 16, 1958 and May 25, 1967, appellant had spent almost four years *out* of prison, on bail.

On December 4, 1967, appellant filed a new Sec. 2255 motion to vacate and set aside his judgment of conviction. This was denied, and this appeal was taken. Meanwhile, on January 11, 1968, appellant had filed a petition for a writ of habeas corpus with Mr. Justice Douglas, which was by him referred to the whole court, and docketed as Misc. No. 1178, October Term 1967. The Supreme Court declined to take action April 1, 1968 (390 U.S. 1001).

In this court's opinion in this case in 1967, we said (378 F.2d 16, 17-18) what appears in note 1 herein.[1] We declined to await the Supreme Court's opinion in *Katz v. United States,* 369 F.2d 130 (1966).

Our opinion in *Katz, supra,* was reversed by the Supreme Court on December 18, 1967 (389 U.S. 347). This appeal presents the issue as to whether *Katz* should be applied retroactively. In *Desist v. United States,* ..... U.S. ....., decided March 24, 1969 (29 C.C.H. U.S.Sup.Ct. Bull. No. 18, B 1066 at B 1068), the Supreme Court said:

"We have concluded . . . that to the extent *Katz*

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[1] "We were asked in oral argument to anticipate what the Supreme Court of the United States might say or do in Katz v. United States, 9 Cir., 369 F.2d 130, certiorari granted March 13, 1967, and further to anticipate that whatever that Court might say or do would be held retroactive in effect. This we decline to do. We prefer to follow, as we must, the last views expressed by the majority of the Supreme Court in Osborn v. United States, 87 S.Ct. 429, 17 L.Ed.2d 394 (1966). Here, as in Osborn, supra, the electronic device was used by and with the consent of one party to a conversation to make an accurate record thereof. The tape recording did not involve 'the surreptitious surveillance by an outsider.' "

> departed from previous holdings of this Court, it should be given wholly prospective application."

Cf. also Kaiser v. New York, ... U.S. ....., decided March 24, 1969 (29 C.C.H. U.S.Sup.Ct. Bull No. 18, B 1103).

AFFIRMED.

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
County of Orange)

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Orange, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 315 Third Street, Huntington Beach, California 92646, that on AUGUST , 1969, I served the within PETITION FOR WRIT OF CERTIORARI (Marchese v. United States) on the following named party by depositing two copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the city of Huntington Beach, California, addressed to said party at the address as follows:

UNITED STATES ATTORNEY
CENTRAL DISTRICT
12TH FLOOR, U. S. COURTHOUSE
LOS ANGELES, CALIFORNIA 90012

I declare under penalty of perjury that the foregoing is true and correct.

Executed on AUGUST , 1969, at HUNTINGTON BEACH, CALIFORNIA.

D. A. Standefer

Dean-Standefer Co., 315 3rd St., Huntington Beach 92646
(714) 536-7161